STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2003
v	No. 235135 Macomb Circuit Court
KENNETH ARTHUR DOMAS, Defendant-Appellant.	LC Nos. 00-000331-FH 00-000332-FH 00-000334-FH 00-000335-FH

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), five counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and two counts of furnishing alcohol to a minor, MCL 436.1701(1). The conduct arose out of incidents involving four different victims that occurred in 1999 at defendant's home. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

In November 1999, the mother of a student at Eastland Junior High School in Roseville, Michigan, learned that her son was "hanging out" with a "child molester." Based on the information, the mother telephoned the Roseville Police Department and subsequently spoke with the principal of the junior high school. Roseville Police Officer Joseph Hargreaves went to the junior high school, spoke with the principal, and spoke with three male students. He thereafter requested the involvement of Roseville detectives. Numerous boys, including victims O.T., T.G., A.M., and K.M., were interviewed. A search warrant was executed at defendant's home and pornographic magazines were recovered. Defendant was also interviewed. He admitted that he supplied alcohol and cigarettes to the minor victims but denied engaging in sexual activity with them. He later admitted, however, that he had watched the boys masturbate. After investigation, defendant was charged with numerous counts of criminal sexual conduct and furnishing alcohol to five minor, male children.[1]

[1] The case involving one of the five minors was dismissed at trial when the minor failed to appear.

At a consolidated trial, the jury heard testimony from four of the victims. Victim A.M. testified that he met defendant in the summer or fall of 1999. A.M. went to defendant's home between five and ten times. Defendant provided, or purchased, alcohol and cigarettes for A.M. and his friends. Other boys, including victims O.T., T.G., and K.M., were present when A.M. visited defendant's home. Defendant left pornographic magazines on the table in his home and permitted A.M. to view them. According to A.M., defendant grabbed A.M.'s bottom on one occasion. In addition, defendant propositioned A.M. by asking him to "suck his [defendant's] penis." On two or three occasions, A.M. masturbated in front of defendant in exchange for money or beer. A.M. also witnessed defendant "sucking" O.T.'s penis while defendant and O.T. were in defendant's bedroom.

T.G. testified that he met defendant in 1999. After meeting defendant, T.G. visited him "a lot." Defendant gave T.G. alcohol while T.G. was in defendant's home, and defendant purchased alcohol for T.G. and his friends when they provided money. T.G. testified that he and other friends masturbated in front of defendant. In return, defendant offered them money or agreed to go to the store to buy things for them. On one occasion, defendant grabbed T.G.'s penis through his clothing

K.M. testified that he went to defendant's house approximately five times in 1999. On one occasion, defendant grabbed K.M.'s penis and said, "I'll do yours, if you do mine." K.M. responded, "No." On another occasion, defendant offered money to K.M. if he agreed to "jack" defendant "off" or "blow" defendant.

O.T. testified that he met defendant in 1999. Thereafter, O.T. visited defendant's house numerous times. Defendant had pornographic magazines at his house, and all of O.T.'s friends met there and consumed alcohol there. Defendant put his lips around O.T.'s penis on two occasions. On three or more occasions, defendant used his hand to touch O.T.'s penis

Detective David Pulliam testified that he interviewed defendant, who admitted he supplied cigarettes and alcohol to the minors, kept pornographic magazines on the living room coffee table, and watched the minors masturbate. Defendant denied engaging in sexual activity with the youth.

The jury convicted defendant of all of the charged offenses that were tried before it.

I

Defendant first argues that the trial court improperly consolidated the five separate cases, involving the five victims, into one trial, in violation of MCR 6.120(B). We review the trial court's decision regarding joinder for an abuse of discretion. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120 provides:

> (A) . . . Two or more informations or indictments against a single defendant may be consolidated for a single trial.

> (B) On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
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> (1) the same conduct, or
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> (2) a series of connected acts or acts constituting a single scheme or plan.
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> (C) On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

MCR 6.120 codified the Supreme Court's decision in *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977). See *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, modified on other grounds 441 Mich 867 (1992).

The trial court in this case permitted joinder of the cases, ruling that the offenses were "very similar, if not precisely identical conduct, they are very similar type of conduct and they are connected and they involve the same individual, and it does appear to be part of what you might call a single plan or scheme." In *People v McCune*, 125 Mich App 100, 103; 336 NW2d 11 (1983), a panel of this Court discussed when offenses are related as part of a single scheme or plan such that joinder of several informations is appropriate. The panel relied on American Bar Association Standards for Criminal Justice (2d ed), Joinder and Severance, as approved by the House of Delegates in 1978, and quoted the commentary to Standard 13-1.2:

> "Common plan offenses are the most troublesome class of related offenses. These offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (*which can be physically and temporally remote)* is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses to achieve a unified goal." [*Id.* at 103 (emphasis added).]

In *McCune*, this Court affirmed the trial court's decision to join cases that involved five separate incidents of conspiracy and robbery or breaking and entering at four separate locations over a time span of nearly five months. *Id.* at 101-102. Similarly, in *People v Miller*, 165 Mich App 32, 44-45; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915 (1990), this Court

determined that two offenses involving the same victim were properly joined even though they occurred at different times.

> [T]he victim's testimony revealed that these incidents occurred during warm weather and at the learning center in locations of seclusion. These facts indicate a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself.
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> Moreover, the trial did not involve substantially different proofs on these charges to the extent that it would confuse the defendant in his defense, or deprive him of any substantial right. [*Id.* at 45.]

As in *McCune* and *Miller*, we conclude that the acts alleged in each of the separate cases against defendant constituted "part of a single scheme or plan" on defendant's part to engage in sexual misconduct with young boys, who visited his home, had access to pornographic materials, and were rewarded with alcohol and cigarettes. Moreover, although temporal proximity is not a requirement, *McCune*, *supra* at 103, the acts in each of the cases occurred within the same time frames in 1999.[2] Further, the victims knew each other and saw each other in or around defendant's house during the time frames of the occurrences. Because we find that the offenses were related, contrary to defendant's argument on appeal, we must determine whether the trial court abused its discretion in joining the related charges for a single trial. *McCune*, *supra* at 102.

Upon review, we find no abuse of discretion. There was no unfair prejudice to defendant because of the joinder. The offenses did not involve substantially different proofs such that the jury would be confused by the testimony. See *Miller*, *supra* at 45. The number of charges and the evidence itself also did not result in any unfair prejudice. MCR 6.120(C). The trial was simple and short. Each victim's individual testimony was sufficient to establish the elements of the crimes involving him. The counts, including each victim's name, were separately delineated on the verdict form. Moreover, we find that the parties' resources and the convenience of witnesses were served by joinder in this case. MCR 6.120(C). Toward that end, we believe that the evidence with respect to each victim would have been admissible in each of the trials, if held separately, as evidence of a common plan or scheme under MRE 404(b). See, generally, *Duranseau*, *supra* at 208.[3] Thus, separate trials would have required repeated testimony from

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[2] While the felony complaint in O.T.'s case, 00-000335-FH, identified the date of the offenses as July 1998 to November 1999, the testimony at trial indicated that O.T. met defendant in 1999. The felony complaints in the other files alleged offenses occurring in 1999.

[3] We are mindful that in *Daughenbaugh*, *supra* at 510, this Court rejected the prosecution's argument that joinder was permissible if evidence of the other offenses would be admissible under MRE 404(b) in the separate trials. The ruling is dicta because the panel previously determined that the robberies were not part of a single scheme or plan. *Id.* at 509-510. The robberies occurred over several months and involved a party store, two gas stations, and an automotive store. *Id.* at 508. Because the Court found that the offenses were not related, the trial court was *required* to sever the offenses for separate trials. MCR 6.120(B). Whether the evidence of the other offenses could be admitted at the separate trials was irrelevant to a determination of the severance issue in that case. In the case at hand, the offenses are related and we rely in part on *Duranseau* in concluding that the decision to refuse to sever is not prejudicial

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most, if not all, of the prosecution's minor witnesses. Because the testimony of each victim would be admissible in the other trials, we disagree with defendant that the outcome of the cases would have been different if the cases were tried separately.

In sum, the offenses were related such that joinder was appropriate, and the trial court did not abuse its discretion in joining the cases for a single trial.

II

Defendant next argues that the trial court improperly admitted other bad-acts evidence under MRE 404(b), specifically the fact that he was previously convicted of three counts of child sexually abusive activity in 1996. We agree that the trial court improperly admitted the other bad-acts evidence. We find, however, that the error does not require reversal.

We review the preserved evidentiary error for an abuse of discretion. *People v Crawford,* 458 Mich 376, 383; 582 NW2d 785 (1998). Where error is found, reversal is not required unless defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity,* 460 Mich 484, 495; 596 NW2d 607 (1999).

MRE 404(b) provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In *People v VanderVliet,* 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. It must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material

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if the evidence pertaining to the other charges would have been admissible in each of the trials.

> fact at issue more probable or less probable than it would be without the evidence. [*Id*.]

The offered evidence must truly "be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390 (emphasis in original).

The prosecutor articulated permissible purposes for the evidence under MRE 404(b), specifically that the evidence demonstrated a common plan or scheme or demonstrated motive. The prosecutor did not, however, demonstrate that the similar-acts evidence was logically relevant to show a common plan or scheme or to demonstrate motive. With respect to common plan or scheme, the evidence of the charged conduct must be sufficiently similar to the evidence of the uncharged conduct to support an inference that they were manifestations of a common plan, scheme, or system. *People v Katt,* 248 Mich App 282, 305; 639 NW2d 815 (2001), lv gtd in part on other gds 466 Mich 889 (2002), citing *People v Sabin (After Remand),* 463 Mich 43, 63; 614 NW2d 888 (2000); see also *People v Pesquera,* 244 Mich App 305, 319; 625 NW2d 407 (2001). At the motion hearing in this case, the prosecutor represented, with very little detail, that the prior conduct upon which the convictions were based included that defendant was charged with seven counts of "the same type of thing" with young boys. The boys in the prior cases were photographed in the nude and defendant took the photographs to different people to determine if anyone was interested in meeting the boys. The prosecutor argued that MRE 404(b) permitted admission of the evidence to show that defendant had a plan, motive, or scheme "to do the type of things that he's done here and that he has done in the past."

We disagree. There was no demonstration of "'"a concurrence of common features"'" between the charged and uncharged acts such that the charged acts were "'"naturally to be explained as caused by a general plan of which they are individual manifestations."'" *Katt, supra* at 306, quoting *Sabin, supra* at 64, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted). The only common features were that the conduct involved young boys. With respect to the "motive," the prosecutor also failed to sufficiently explain how defendant's conduct in the prior cases demonstrated motive. Because the prosecutor failed to demonstrate logical relevance, we conclude that the trial court abused its discretion when it admitted evidence of the prior convictions. In so ruling, we note that the trial court failed to analyze the issue within the framework set out in *VanderVliet* and its progeny.

While we find an abuse of discretion, we do not find error requiring reversal. Defendant has not met his burden of establishing that, more probably than not, a miscarriage of justice occurred. See *Lukity, supra* at 495. The trial court instructed the jury that the other-acts evidence could not be used for any purpose other than to show that defendant used a plan, system, or characteristic scheme that he used before or since. Given that the prosecutor did not elicit testimony about the details of defendant's prior conduct at trial,[4] the jury could not have determined that defendant had a common plan, system, or characteristic scheme on a prior occasion. Further, the trial court instructed that the other-acts evidence could not be considered

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[4] During trial, the prosecutor failed to introduce the details of the prior conduct. Rather, he introduced the fact of the convictions and that they involved children in a sexually abusive context.

to show that defendant was a bad person, was likely to commit crimes, or must be guilty in this case because he was guilty of other bad conduct. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). More importantly, the evidence against defendant was overwhelming; the victims' testimony was not contradicted and appeared highly credible given the similarity in the victims' stories. Reversal is not required "'unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), quoting *Lukity, supra* at 496.

III

Finally, defendant raises two sentencing issues. First, defendant argues that the trial court erred by failing to use the legislative sentencing guidelines. Second, defendant argues that he and his counsel were denied the right of allocution at sentencing.

We address the issue of allocution first, and conclude that resentencing is necessary. At the outset, we note that the prosecutor concedes that the trial court did not afford defendant or his trial counsel the opportunity for allocution at sentencing. MCR 6.425(D)(2)(c) provides, in part:

> (2) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing the court, complying on the record, *must:*
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> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence [Emphasis added.]

In *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002), the Court held that the court rule does not require the court to specifically ask a defendant if he wishes to allocute but must merely provide an opportunity to allocute. In *Petit*, the defendant's attorney allocated on the defendant's behalf, and the victim's daughter also spoke to the trial court. *Id.* at 626. The trial court then asked if there was "anything further" before it imposed sentence. *Id.* at 628. The Court held that this was sufficient to satisfy MCR 6.425(D)(2)(c). *Petit, supra* at 629.

In this case, the trial court specifically asked defense counsel if he had any additions, deletions, or objections to the presentence report. After several objections were made and resolved, the trial court asked defense counsel if there was anything else. The court then immediately asked defendant if there was "[a]nything that you want to indicate on the report, Mr. Domas? Any additions, deletions or objections?" Defendant stated, "[t]he only thing in there is just my health, that's it." The trial court subsequently indicated that it was ready to impose sentence. It never gave the defendant, defendant's lawyer, or the victims an opportunity to advise the court of any circumstances that the court should consider in imposing sentence.[5]

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[5] Before sentencing defendant on the convictions in LC No. 00-000335-FH, the prosecutor asked, and received permission, to address the trial court. When defendant's counsel attempted (continued…)

Resentencing is required where the trial court fails to comply with MCR 6.425(D)(2)(c). *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

With respect to the sentencing guidelines issue, the parties agree that all the crimes for which defendant was convicted occurred after January 1, 1999. The legislative guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342, n 5; 604 NW2d 327 (2000). The prosecution concedes that the statutory guidelines are applicable. Accordingly, in imposing sentence on remand, the court shall use the statutory guidelines.

Defendant's convictions are affirmed but the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

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to respond to the prosecutor's remarks, the trial court interrupted. The ensuing discussion pertained only to how many felony convictions defendant had and the propriety of considering those at sentencing.